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Issue Date: 10 August 2007

Case No.: 2004-LHC-00448

OWCP No.: 15-043752

In the Matter of:

P.T.,
Claimant,

v.

NAVY PERSONNEL COMMAND/MWR,
Employer,

CONTRACT CLAIMS SERVICES,
Carrier.

DECISION ON PETITION FOR RECONSIDERATION

On June 19, 2007, the undersigned issued a Decision and Order on Remand, awarding benefits to Claimant under the Longshore Harbor Workers' Compensation Act ("the Act"), as extended pursuant to the Non-Appropriated Fund Instrumentalities Act, 33 U.S.C. § 901 *et seq.* Claimant filed a Motion for Reconsideration or Clarification on July 12, 2007.

This claim was brought against Navy Personnel Command/MWR and Contract Claims Services (collectively, "Employer"), arising from injuries to Claimant's knees related to an accident that occurred on June 20, 1999 while working for Employer. Employer voluntarily paid Claimant for some periods of disability.¹ However, the issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for formal hearing, which was held by the undersigned on September 13, 2004 in Honolulu, Hawaii. On May 10, 2005, the undersigned issued a Decision and Order awarding temporary total disability benefits at the rate of \$236.59 per week, based on the agreed average weekly wage ("AWW") of \$354.89, from February 11, 2000 to February 25, 2000 and from May 15, 2003 to September 1, 2004 as well as temporary partial disability benefits at the rate of \$140.76 per week commencing September 1, 2004. An unpaid medical expense was also awarded. Employer petitioned for reconsideration, which was denied on June 16, 2005, and subsequently Employer filed an appeal of both the finding that Claimant had not yet reached maximum

¹ Employer has made voluntary payments for the following periods of temporary total disability: July 19, 1999 to August 2, 1999; October 27, 1999 to November 20, 1999; April 27, 2000 to September 20, 2000; December 8, 2001 to May 14, 2003. EX 24 at 45. However, the parties have never submitted information that would clarify all voluntary payments made for all periods and classes of disability.

medical improvement with regard to her knee injuries as well as the award of attorney's fees. Employer did not raise on appeal any contentions regarding the status of Claimant's left knee injury.

On June 26, 2006, the Board issued a Decision and Order, affirming the finding that the left knee injury was work related and that Claimant had not attained maximum medical improvement regarding this injury. BRB No. 05-0796 (not published). As to Claimant's right knee, the Board vacated the decision that this injury had not reached maximum medical improvement and remanded the case for further consideration. *Id.* at 8. The Board also held that Claimant remains entitled to temporary partial disability benefits for her left knee injury that were awarded September 1, 2004 and continuing, irrespective of the finding on remand concerning the nature of Claimant's right knee injury. *Id.* at 6. The Board also held that Employer's contentions concerning the award of attorney's fees were without merit and affirmed that award. *Id.* at 7.

The parties did not request that the record be re-opened. Briefs were submitted by Claimant and Employer on January 22, 2007 and January 23, 2007, respectively. In its brief, Employer addressed the sole issue that was before the undersigned on remand and urged a finding that substantial evidence indicates Claimant reached MMI in the right knee as of June 1, 2002. Claimant conceded the issue, agreed with Employer that according to Dr. Lee Claimant attained MMI as of June 1, 2002 and noted that the parties agreed to a scheduled award of 2 percent impairment to the right knee. *Id.* at 6-7, citing Hearing Transcript ("TR") at 9-10. I found that the parties resolved the issue by stipulation which was adequately supported by substantial evidence in the record. *See* Remand Decision and Order at , 2-3, citing Employer's Brief at 2-5, 7-8, citing TR at 8-10, 11; CX 12 at 8, 10; CX 20; CX 21 at 2; EX 52 at 1-2, 4; *see also* Claimant's Brief at 6-7, citing TR at 9-10. Accordingly, a Stipulated Decision and Order on Remand Awarding Benefits was issued on June 19, 2007, ordering Employer to pay a scheduled award of 2 percent partial disability of the right knee, which attained permanency as of June 1, 2002. Claimant filed a Motion for Reconsideration or Clarification on July 12, 2007 concerning the following matters.

Interest

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). Accordingly, it was noted in the Remand Decision and Order that interest on the unpaid compensation amounts due and owing by Employer should be included in the District Director's calculations of amounts due under that decision and order.

In the Order, the undersigned awarded a 2 percent impairment of the right leg as of June 1, 2002. In her motion, Claimant notes that she previously received a voluntary compensation from Employer for a 2 percent impairment to "a leg." Cl. Mot. at 3. Although she does not

indicate when this occurred she states that Employer "made that payment at or shortly after the last of its payments without an award for temporary total disability through May 14, 2003." *Id.* Claimant notes that Employer took credit for this amount against payments made in compliance with the 2005 award. *Id.* Claimant notes that the award is payable from the date of permanency and requests that Employer be required to pay interest except for the time from the voluntary payment for a "2-percent impairment of a leg" until the date the credit was taken for that payment against the 2005 award. *Id.* at 3-4.

Apparently, Claimant may be requesting an Order clarifying the amount of interest due on this award. If so, counsel for Claimant instead should submit information concerning this matter to the District Director, who shall make the appropriate calculations as to any interest due.

Claimant's request for a comprehensive award

In the Stipulated Decision and Order on Remand Awarding Benefits issued on June 19, 2007, Claimant was awarded a scheduled injury of 2 percent disability of the right knee, which attained permanency as of June 1, 2002. Employer paid temporary total disability ("TTD") benefits voluntarily as of December 8, 2001 until May 14, 2003, and prior to that period had paid TTD for some other periods of time as well.²

Claimant requests a comprehensive award covering all periods of disability since Claimant's injury on June 20, 1999. Claimant requested this previously in her Remand Brief. She considers a "comprehensive award" an award that would cover the periods addressed in the 2005 Decision, the periods of undisputed temporary total disability fully described in that Decision for which the employer has previously paid compensation without an award, and the scheduled permanent partial disability addressed on remand. Yet there can be no comprehensive award where there are outstanding periods of time since Claimant's injury regarding which the parties have never submitted adequate evidence of the periods and classes of disability, or evidence of all voluntary payments made. For Claimant this includes the gaps of time that run from the injury of June 20, 1999, to the start of voluntary compensation for TTD on July 19, 1999, as well as for gaps that occur in the periods in between the voluntary TTD payments that intermittently ran prior to the order for Employer to compensate Claimant for TTD (the ordered covered periods from February 11, 2000 to February 25, 2000, and from May 15, 2003 to September 1, 2004).

Claimant thus cannot be granted her request for a *comprehensive* award. However, notwithstanding the dearth of evidence with which to make an award comprehensive of all time periods and covering all classes of disability since Claimant's injury on June 20, 1999, Employer's voluntary payments to Claimant will be included in this amended Order.

² Employer has made voluntary payments for the following periods of temporary total disability: July 19, 1999 to August 2, 1999; October 27, 1999 to November 20, 1999; April 27, 2000 to September 20, 2000; December 8, 2001 to May 14, 2003. See Remand Decision and Order at 2, citing EX 24 at 45. However, the parties have never submitted information that would clarify all voluntary payments made for all periods and classes of disability. *Id.* During some of the periods of time following the injury, Claimant did work, but her wages and hours for this work, some of which Employer called "light duty," have not been submitted. See 2005 D&O at 4, citing Tr. at 46-47, CX 17, 27, RX 20.

Claimant's request for clarification concerning credit claimed by Employer

In the Remand Decision and Order of June 19, 2007, Claimant was awarded permanent partial disability for the right leg. The injury was to the right knee, which attained permanency on June 1, 2002. Employer was ordered to pay Claimant a scheduled award of 2 percent disability of the right knee. In her petition for reconsideration, Claimant states that Employer is erroneously attempting to claim that it has already compensated Claimant for this award when it voluntarily paid benefits for TTD; Claimant states Employer is also claiming the TTD payments constitute an overpayment for the year following the date of permanency of that injury.³ Employer voluntarily paid TTD from December 8, 2001 to May 14, 2003 as well periods prior as noted above. Claimant contends Employer is trying to apply the voluntary TTD payments made around the time of permanency of the right leg to award of 2 percent impairment of the right leg.

The temporary total disability benefits awarded in 2005 for the time period May 15, 2003 to September 1, 2004 were awarded solely for Claimant's left knee cumulative injury; the date of permanency of the right leg preceded that time period; permanency of the right leg occurred per the parties' stipulation on June 1, 2002.⁴ As implied by the parties' own stipulation to that date as well as by substantial evidence in the record, any compensation for *temporary* disability from June 1, 2002 and thereafter would be compensation for the left knee injury. Claimant received voluntary TTD compensation from December 8, 2001 to May 14, 2003. *See* 2005 D&O at 4. The left knee injury constituted a temporary total disability that emerged in July 2001 as a cumulative injury, due to the strain on the left knee because of the injury that the accident itself caused to the right knee. *See id.* at 4, 6. That left knee injury emerged *prior to* the voluntary period of payment for TTD from December 8, 2001 to May 14, 2003 yet Employer per Claimant is trying to claim credit for payments made during that period against the PPD award for the right leg. This voluntary compensation period and nearly all of the other voluntary periods of TTD compensation coincide with the off-duty advisories issued by Claimant's doctors. *Id.* at 9. In light of the evidence and the parties' stipulations, I conclude that the TTD disability payments from December 8, 2001 to May 14, 2003 were at minimum at all times for Claimant's left knee albeit for some periods may also have been for compensation for Claimant's right knee prior to the date of permanency on June 1, 2002.

To state the obvious, Employer cannot take any credit for compensation of one injury against amounts due for another injury. Even where injuries to the two knees originate from the same work related incident, each injury is separately compensable. *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 697 (9th Cir. 2002). To clarify this point the prior Order is vacated and the award in the prior Order now will be accompanied by *all* prior awards and *all* voluntary payments made to Claimant that were noted in the record. *See* 2005 D&O at 4.

Claimant's reconsideration request concerning concurrent awards

³ Concerning the year following the stipulated permanency date of June 1, 2002, Employer according to Claimant has indeed misread the clause: "Employer has read it to establish that that year's payments were, except for the initial 5.76-week period, an *overpayment*." Cl. Mot. at 11.

⁴ The 2005 Decision and Order indicated Claimant's left knee has yet to attain permanency, a finding that was affirmed by the Board in its Decision and Order of June 26, 2006. BRB No. 05-0796 (not published).

Where a claimant receives two separate and distinct injuries, the first resulting in an award of unscheduled PPD benefits and the second resulting in an award of PTD benefits, those awards may run concurrently if needed to avoid conflict with the Act's maximum-payment provisions, so that claimant will eventually receive the amounts due under both awards. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 91 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *see Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (BRB October 29, 1997). This is also the case where a claimant receives an award of TTD benefits for one injury and PPD for another, separate injury. *See Hansen*, 31 BRBS at 158-59.

In the Decision and Order on Remand, item 3 in the Order states:

3. All monies owed shall be administratively calculated by the District Director, who shall make the necessary calculations as to amounts due, including interest, and who shall credit Employer for all payments made for temporary total disability as of June 1, 2002 and beyond.

Claimant argues that the Remand Decision and Order erroneously assumed that the 2 percent impairment to the right leg (the PPD award) is subsumed in the TTD award for the time period that the PPD award ran, and that at most the awards for TTD and PPD should run, if need be, concurrently. Claimant also argues that item 3 of the Order is too vague, and could be construed to mean that Claimant was not entitled to compensation that Employer paid without an award for nearly a year after the stipulated permanency date for the right knee, June 1, 2002. Claimant adds that Employer "has read it to establish that that year's payments were, except for the initial 5.76-week period, an overpayment." Cl. Mot. at 11.

For the following reasons, the undersigned agrees that the Decision and Order on Remand was in error on this point, and that Claimant is entitled to receive awards both for PPD and for TTD. *See Codd v. Stevedoring Services of America*, 31 BRBS 134, ALJ Nos. 95-LHC-873, 95-LHC-874 at 4 (ALJ December 19, 1996), citing *Hastings*, 628 F.2d at 91. As discussed above, Claimant sustained two separate injuries for which she has been awarded PPD for the right leg and TTD (as well as currently TPD) for the left leg. Therefore, the PPD cannot be subsumed in the TTD as the prior order erroneously reflected. The order is hereby vacated on that point. In addition, as discussed above Employer may not claim credit for payments made on one time period or class of disability (or a separate disability) as against another. All monies owed shall be administratively calculated by the District Director, who shall make the necessary calculations as to amounts due, including interest. Any need for concurrent awards shall be determined by the District Director.

ORDER

Claimant's Motion for Reconsideration is **GRANTED** insofar as the Remand Decision and Order is vacated as to item 3 in the Order, and is amended to include the dates of voluntary compensation and is changed to distinguish the PPD award for Claimant's right leg from the TTD payments for Claimant's left leg including during the time period from December 8, 2001 to May 14, 2003.

Based on the foregoing stipulated findings that are supported by the record, I issue the following amended compensation order which includes the June 17, 2007 scheduled award of two percent permanent impairment to the right knee as of June 1, 2002. Claimant remains entitled to temporary partial disability benefits for her left knee injury that were awarded September 1, 2004 and continuing. Whether concurrent awards are needed, as well as calculation of all specific dollar computations of award amounts and interest due, shall be administratively determined by the District Director. The parties shall submit adequate information to the Director to make these calculations, if they have not yet done so.

It is therefore **ORDERED**:

1. Employer shall pay Claimant a scheduled award of 2 percent partial disability of the right knee, which attained permanency as of June 1, 2002.
2. Prior awards and voluntary compensation include the following:
 - a. Employer has made voluntary payments for the following periods of temporary total disability: July 19, 1999 to August 2, 1999; October 27, 1999 to November 20, 1999; April 27, 2000 to September 20, 2000; December 8, 2001 to May 14, 2003.
 - b. In the 2005 Decision and Order, Claimant was awarded the following: temporary total disability benefits at the rate of \$236.59 per week (based on the agreed AWW of \$354.89), from February 11, 2000 to February 25, 2000 and from May 15, 2003 to September 1, 2004; commencing September 1, 2004, temporary partial disability benefits at the rate of \$140.76 per week; compensation for the left knee brace the amount of \$78.12 plus interest, as well as future medical services and supplies.
3. Employer shall pay interest on all unpaid compensation benefits from the date the compensation became due until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.
4. All monies owed shall be administratively calculated by the District Director, who shall make the necessary calculations as to amounts due, including interest.

SO ORDERED.

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Russell D. Pulver
Administrative Law Judge

San Francisco, California